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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CLYDE OSBORNE,

Appellant,

v.

STATE OF OHIO,

Appellee.

On Appeal From The Supreme Court Of Ohio

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STATEMENT OF THE CASE

In its Statement of the Case, Appellee, the State of Ohio, claims that the two Florida men mentioned as information sources in the search warrant were "subsequently convicted on federal charges arising from the use of the United States mail to distribute child pornography." (Appellee at 1) This alleged information is not in the record and is not relevant to the issues before this Court. The State claims that State's Exhibit 1-D is a photograph of a person different from the person depicted in State's Exhibits 1-A, 1-B, and 1-C. (Appellee at 4) The record indicates, however, that the same person was depicted in all four pictures. (J.A. 11, 16, 22) The State gives its judgment, not based on the record, that the jury "did not take long to find Osborne guilty." (Appellee at 5)

ARGUMENT

I. A FACIALLY INVALID STATUTE THAT PROSCRIBES FIRST AMENDMENT ACTIVITY IS UNENFORCEABLE AND CANNOT BE CONSTRUED AND THEN APPLIED TO CONDUCT WHICH OCCURRED PRIOR TO THE CONSTRUCTION.

Mr. Osborne argued in his Brief that an unconstitutionally overbroad statute may not be used to convict through a later constitutionalizing construction, because such a statute is a nullity. He argued that such a conviction is improper because the accused was not forewarned that his conduct would be illegal, and that the construction given in this case by the Ohio Supreme Court was unforeseeable. Finally, he argued that, where the construction is made only on appeal, his conviction is based on elements upon which he had no trial.

A. Ohio Revised Code Section 2907.323(A)(3) Was Unconstitutional On Its Face Due To Its Infringement Of First Amendment Rights. Such A Statute Is Invalid And Has No Legal Effect, And A Conviction Obtained Under It Is Invalid.

The State fails to respond to Mr. Osborne's position that an overbroad statute is a nullity and may not support a conviction

as a result of a constitutionalizing construction. Instead the State, in Section III of its Brief, claims that O.R.C. 2907.323(A)(3) was not overbroad as written. (Appellee at 36) However, the State does not dispute Mr. Osborne's position that O.R.C. 2907.323(A)(3) as written prohibited possession of depictions of mere nudity and lacked an element of scienter. (Appellant at 14) Nor does the State explain why the Ohio Supreme Court found it necessary to re-define "nudity" and add scienter, if O.R.C. 2907.323(A)(3) was constitutional on its face. The language of O.R.C. 2907.323(A)(3) itself, as well as the Ohio Supreme Court's attempt to give it a constitutionalizing construction, demonstrate that O.R.C. 2907.323(A)(3) was facially invalid.

Mr. Osborne's "acts were lawful because the statute that sought to prohibit them was overbroad and therefore invalid." *Massachusetts* v. *Oakes*, 491 U.S. ____, 109 S.Ct. 2633 (1989) (Scalia and Blackmun, JJ., concurring in part and dissenting in part; joined by Brennan, Marshall and Stevens, JJ., dissenting). Ohio Revised Code 2907.323(A)(3) was unconstitutional as written, and a subsequent construction may not be used to affirm Mr. Osborne's conviction.

B. Ohio Revised Code 2907.323(A)(3) Gave No Fair Warning That It Prohibited The Conduct Later Identified By The Ohio Supreme Court As Illegal When It Re-Wrote The Statute In Mr. Osborne's Case.

The State argues in Section III(B) of its Brief that O.R.C. 2907.323(A)(3) as written gave fair warning of the conduct prohibited, if it was read together with O.R.C. 2901.21(B), O.R.C. 2907.321, O.R.C. 2907.322, and a series of cases addressing adult obscenity. (Appellee at 39, 41) The great volume of material cited by the State as necessary to understand O.R.C. 2907.323(A)(3) belies the claim that fair warning was given by the statutory language.

The State urges that O.R.C. 2907.323(A)(3) as written was not "impermissibly vague in all of its applications," citing

Hoffman Estates v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). (Appellee at 40) However, *Hoffman* applies only where "the enactment implicates no constitutionally protected conduct." *Hoffman*, 455 U.S. at 494-495. In the case at bar, the enactment implicates constitutionally protected rights, namely speech and privacy. It was necessary to construe O.R.C. 2907.323(A)(3) or to hold it unconstitutional.

Finally, the State argues that Mr. Osborne should have foreseen that a "narrowing construction" would be made because a line of cases held that simple nudity is not obscene. (Appellee at 40-41) This argument ignores the fact that O.R.C. 2907.323(A)(3) is directed specifically at nudity, not obscenity, and that nudity is clearly defined by O.R.C. 2907.01(H). Ohio Revised Code 2907.323(A)(3) was vague both on its face and in its application to Mr. Osborne.

C. The Ohio Supreme Court Added New Elements To Ohio Revised Code 2907.323(A)(3) And Affirmed Mr. Osborne's Conviction On The Basis Of Them, Even Though Mr. Osborne Never Had A Hearing On, Or An Opportunity To Defend Against, Those Elements.

The trial court below did not require proof of the elements that the Ohio Supreme Court later added to O.R.C. 2907.323(A)(3)—a scienter element and a new definition of nudity that requires a lewd exhibition, or involves a graphic focus on the genitals, and an appeal to prurient interest. (J.A. 44-46) The jury below was not instructed on these elements. Mr. Osborne therefore did not have a trial on offense elements that ultimately were key to sustaining his conviction.

The State does not dispute that a conviction upheld on appeal on the basis of offense elements not in issue at trial violates due process. The State argues rather that the failure to have a trial on the newly added elements was harmless error because Mr. Osborne did not object to the jury instruction on nudity. (Appellee at 43-44) Mr. Osborne challenged the constitutionality of O.R.C. 2907.323(A)(3). (R. 3) His challenge was

overruled. (R. 7) The trial court instructed the jury using the statutory definition of nudity found in O.R.C. 2907.01(H). (R. 120) Ohio Revised Code 2907.323(A)(3) having been ruled constitutional as it stood, there was no basis for an objection to instructions consistent with the language of the statute. The State seems to argue that Mr. Osborne should have predicted the Ohio Supreme Court's later construction of O.R.C. 2907.323(A)(3) and requested an instruction consistent with that construction. Such clairvoyance cannot be required.

The State cites *Henderson* v. *Kibbe*, 431 U.S. 145 (1977), to support its proposition that Mr. Osborne should have asked for a jury instruction on nudity. In *Henderson* the trial court failed to instruct the jury on causation in an armed robbery-murder prosecution. Every lawyer knows that causation is an element of murder. In the case at bar, however, no known element of O.R.C. 2907.323(A)(3) was omitted in the instructions. A lawyer might be held to know that O.R.C. 2907.323(A)(3) as written was unconstitutional, but even so, this would only lead a lawyer to demand, as trial counsel did below, that the court find the statute unconstitutional.

Here, moreover, the question is whether Mr. Osborne stands convicted under a statute different from that which was considered at trial. This Court's decision should not turn on whether the accused objected at trial to the failure to instruct on elements he did not know would exist.

The State does not address the trial court's failure to instruct on scienter. Mr. Osborne requested an instruction which included the "proper purposes" exceptions of O.R.C. 2907.323(A)(3). (R. 103-107) Those "proper purposes" are cited by the Ohio Supreme Court as demonstrating the scienter required for conviction. (J.A. 42) Even under the State's analysis, the failure to instruct on "proper purposes" was prejudicial error.

The State's claim that a constitutionalizing construction of O.R.C. 2907.323(A)(3) was foreseeable ignores the facts of the case. The constitutionality of the statute was challenged at

trial. Neither the trial judge nor counsel for the State was able to foresee the Ohio Supreme Court's construction. Mr. Osborne was charged and found guilty by his jury of an offense with elements different from those in O.R.C. 2907.323(A)(3) as later construed. Mr. Osborne was denied a trial on those elements.

D. The Ohio Supreme Court Substantially Re-Wrote O.R.C. 2907.323(A)(3) In Its Unsuccessful Effort To Bring It Within Constitutional Bounds.

The State argues in Section III(A) of its Brief that the addition of a scienter element, the manner in which "minor" was defined, and re-defining of the term "nudity" did not significantly alter the meaning of O.R.C. 2907.323(A)(3). In trying to render O.R.C. 2907.323(A)(3) constitutional, the Ohio Supreme Court fundamentally changed its import. Each alteration in the statute changed the character of the conduct prohibited and the character of proof required for conviction.

1. The Addition Of Three New Elements To The Definition Of "Nudity" Was A Substantial Change.

The State argues that the Ohio Supreme Court has construed the term "nudity" in Ohio obscenity statutes to require more than mere nudity, and therefore that the use of "nudity" in O.R.C. 2907.323(A)(3) gave notice that a "narrowing construction" would be rendered in the case at bar. (Appellee at 41) However, in none of the cases cited by the State did the statute use "nudity" alone to define obscenity." In *State* v. *Burgun*, 56 Ohio St. 2d 354, 384 N.E.2d 255 (1978), and *Turoso* v. *Cleveland Municipal Court*, 674 F.2d 486 (6th Cir. 1982), *cert. denied* 459 U.S. 880, the statute involved was the current Ohio statutory definition of obscenity, which says that material is obscene if "[i]t contains a series of displays or descriptions of . . . nudity . . . the cumulative effect of which is a dominant tendency to appeal to prurient or scatological interest, when the appeal to such an interest is primarily for its own sake or for commercial exploitation, rather than primarily for a genuine scientific, educational, sociological, moral, or artistic purpose."

O.R.C. 2907.01(F)(5). It says as well that material is obscene if "[i]ts dominant tendency is to arouse lust by displaying or depicting . . . nudity in a way that tends to represent human beings as mere objects of sexual appetite." O.R.C. 2907.01(F)(2).

Obviously, the Ohio Supreme Court did not read these statutory definitions to mean mere nudity. Thus, the State's use of *State* v. *Burgun* and *Turoso* v. *Cleveland Municipal Court* is misleading. (Appellee at 40-41) The same is true of its use of *State ex rel. Keating* v. *Vixen*, 35 Ohio St. 2d 215, 301 N.E.2d 880 (1973), and of *State ex rel. Ewing* v. *"Without a Stitch"*, 37 Ohio St. 2d 95, 307 N.E.2d 911 (1974), which were decided under an earlier Ohio obscenity statute, O.R.C. 2905.34, which used essentially the same definition of nudity as found in O.R.C. 2907.01(F).

The State's use of *Cincinnati* v. *Walton*, 76 Ohio Law Abs. 162, 145 N.E. 2d 407 (1957), of *State* v. *Lerner*, 51 Ohio Law Abs. 321, 81 N.E.2d 282 (1948), and of *State* v. *Rothschild*, 109 Ohio. App. 101, 163 N.E. 2d 907 (1959), is even more misleading, because these three cases involved statutes that prohibited obscenity without any mention of the term "nudity." Thus, in these three cases the issue of the meaning of "nudity" in a statute did not arise.

The State compounds its misleading use of the Ohio obscenity cases by stating that "[p]ast Ohio Supreme Court decisions had narrowed statutes which used the term nudity . . . to its constitutional reach." (Appellee at 43) The State uses this statement to conclude that the Ohio Supreme Court's construction of "nudity" in the case at bar was foreseeable. In fact, however, no prior Ohio Supreme Court case construed mere "nudity" to include lewdness or anything of the like.

Ohio Revised Code 2907.323(A)(3) does not give notice that anything more than nudity is required for conviction. Indeed, at trial below, both counsel for the State and the trial judge put the case to the jury on the basis that O.R.C. 2907.323(A)(3) prohibited mere nudity. (R. *passim*) Neither counsel for the

State nor the trial judge suggested that depictions of nudity were prohibited only if they were lewd, or only if they involved a graphic focus on the genitals, or only if the possession was for prurient interest.

The Ohio Supreme Court said that "possession" in O.R.C. 2907.323(A)(3) means possession "for prurient purposes" only. (J.A. 42) Mr. Osborne has argued that this constitutes a new element in O.R.C. 2907.323(A)(3). (Appellant at 24) The State argues that "prurient interest" is not a new element, but its sole basis for so saying is that "prurient interest" is mentioned only in the Ohio Supreme Court's opinion, but not in the case syllabus. (Appellee at 39) The State says that this means that the reference to "prurient interest" is *dictum* only. (Appellee at 39)

However, the addition of "prurient purposes" was central to the court's effort to make O.R.C. 2907.323(A)(3) constitutional. The court said that before a person can be convicted under O.R.C. 2907.323(A)(3), his possession must be for "prurient purposes." (J.A. 42) "So construed," the court said, "the statute's proscription is not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions which constitute child pornography." (J.A. 42) Thus, the court used its addition of "prurient purposes" in an effort to render O.R.C. 2907.323(A)(3) constitutional under *Ferber*. "Prurient purposes," was not mere *dictum*.

The State argues that, under Ohio case law, if a proposition does not appear in the court's syllabus, it is *dictum*. (Appellee at 39) But the case it cites for this proposition, *Cassidy* v. *Glossip*, 12 Ohio St.2d 17 (1967), said only that the syllabus of a decision states the law of the case. *Cassidy* at 24. *Cassidy* did not suggest, however, that nothing appearing in the court's opinion can form part of its holding. Moreover, a 1985 Ohio statute indicates that an opinion of the Ohio Supreme Court states the case holding, by directing the judge writing an opinion to produce "a clear presentation of the law of the case." O.R.C. 2503.20.

2. The Addition Of Scienter Was A Substantial Change.

The Ohio Supreme Court added a scienter element to O.R.C. 2907.323(A)(3) where none existed. The State points out that the Ohio Supreme Court applied O.R.C. 2901.21(B), which says that if a statute "neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense." This rule codifies Ohio case law. Committee Comment, O.R.C. 2901.21 as enacted in H.B. 511 (1973).

The State claims that the existence of this rule gave notice that recklessness would be added to O.R.C. 2907.323(A)(3) as the required culpable mental state. However, statutes prohibiting possession of communicative materials, which use the word "shall" without any mention of a required scienter, have been construed by the Ohio Supreme Court to impose strict liability. In *Cincinnati* v. *Marshall*, 172 Ohio St. 280 (1961), the court said that an ordinance prohibiting the possession of obscene literature or pictures, and reading "whoever shall . . . have in his possession . . . .," imposed strict liability. *Marshall*, 172 Ohio St. at 284. In *State* v. *Warth*, 173 Ohio St. 15 (1962), the court said that a statute that punished possession of obscene films and read "no person shall . . . have in his possession . . . .," imposed strict liability. *Warth*, 173 Ohio St. at 15-16. The court found both enactments unconstitutional.

Since the enactment of O.R.C. 2901.21(B), the Ohio Supreme Court has addressed several statutes in which scienter was not specified, but none involving First Amendment issues. The State cited two such cases. (Appellee at 37) The first involved child endangering, *State* v. *Adams*, 62 Ohio St. 2d 151, 404 N.E. 2d 144 (1980), and the second, engaging in prostitution, *State* v. *Parrish*, 12 Ohio St. 3d 123, 465 N.E.2d 873 (1984). In both cases the court read in an element of recklessness after finding that the legislature did not intend to impose strict liability. However, in *State* v. *Wac*, 68 Ohio St. 2d 84, 428 N.E. 2d 428 (1981), the court concluded that the legislature, by its silence on scienter, intended to impose strict liability in two

statutes which prohibit engaging in bookmaking, and using premises for gambling. The two statutes each prohibited two separate acts, and in both cases the legislature had specified a scienter element for one but not for the other. *Wac*, 428 N.E. 2d at 431.

A recent Ohio appellate decision says that, "When a statute reads 'No person shall . . . .,' absent any reference to requisite culpable mental state, the statute is clearly indicative of a legislative intent to impose strict liability." *State* v. *Cheraso*, 43 Ohio App. 3d 221, 540 N.E. 2d 326 (1988). The Ohio courts thus do not automatically add "recklessness" when a statute is silent on scienter. The State's contention that it was clear that recklessness was the required mental state under O.R.C. 2907.323(A)(3) and that therefore the addition of this element is not a significant change is without merit. (Appellee at 37)

Prior to Mr. Osborne's case, the Ohio Supreme Court had not considered whether the legislature intended to include a scienter element in O.R.C. 2907.323(A)(3). The Ohio legislature wrote O.R.C. 2907.323 as a supplement to O.R.C. 2907.321 and O.R.C. 2907.322. In O.R.C. 2907.321 and O.R.C. 2907.322, it included the qualifying language "with knowledge of the character of the material." But it omitted such language from O.R.C. 2907.323. This omission suggests that, in O.R.C. 2907.323, the legislature intended to impose strict liability. Moreover, the formulation "with knowledge of the character of the material" was included in the bill that produced O.R.C. 2907.323 but was deleted by the legislature. H.B. 44 (1984).

At trial below, counsel for the State himself prosecuted Mr. Osborne. He did not suggest to the trial court that scienter was an element. (R. *passim*) A scienter element evidently was not foreseeable to counsel for the State at the time of trial. Nor was it foreseeable to the trial judge, who instructed the jury below without reference to a culpable mental state. (R. 120) It strains credulity for counsel for the State to assert that the addition of scienter was foreseeable when neither he nor the trial judge foresaw such an element.

3. The Construction Of "Minor" As A Person Under Eighteen Was A Substantial Change Since "Minor" Is Defined Elsewhere In O.R.C. 2907 As A Person Under Fifteen.

The State next argues that it was obvious that the trial court and the Ohio Supreme Court would find that the term "minor" meant a person under eighteen. (Appellee at 38) "Minor" is undefined in O.R.C. 2907.323(A)(3), and no other Ohio statute gives a definition applicable to O.R.C. 2907.323(A)(3). The State says that the common meaning of "minor" is one under eighteen, citing a law dictionary, a general dictionary, and an Ohio statute relating to gifts. (Appellee at 38) But the State omits mention of the fact that in the same chapter in which O.R.C. 2907.323(A)(3) appears, another provision, O.R.C. 2907.04, uses "minor" to mean one under fifteen. A definition given in the same chapter is more relevant than definitions in a law dictionary, a general dictionary, or a statute on gifts. Since courts read related statutes *in pari materia*, it was more foreseeable that the Ohio Supreme Court would construe "minor" to mean one under fifteen than one under eighteen.

In many states, as in Ohio, the legislature uses a different age of minority for different purposes. *Words and Phrases*, vol. 27, 1989 Cumulative Annual Pocket Part, at 90-91. Even though eighteen is used for certain purposes, that does not give fair warning that it will be so used in a particular context. Moreover, in some situations factors other than age are relevant in determining the meaning of "minor." A person otherwise a minor by virtue of age may not be so if married or emancipated.

The State points out that Mr. Osborne testified at trial that he believed the individual depicted in the photographs was fourteen years old. (Appellee at 39 n. 17) But Mr. Osborne's hearsay belief as to the age of the individual depicted is irrelevant on the issue of whether it was foreseeable what age O.R.C. 2907.323(A)(3) required.

The State attempts to distinguish *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969), by saying that the Ohio

Supreme Court did not radically reconstruct O.R.C. 2907.323(A)(3). (Appellee at 41-42) But in this case as in *Shuttlesworth* the state supreme court added elements to try to render an overbroad statute constitutional and substantially changed the character of the statute. Ohio Revised Code 2907.323(A)(3) was enacted to regulate child "nudity-oriented" material. The Ohio Supreme Court has attempted to turn it into a child pornography statute.

II. THE STATE MAY NOT PROHIBIT PRIVATE POSSESSION IN THE HOME OF MATERIALS THAT DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSISTS OF A "LEWD EXHIBITION" OR "INVOLVES A GRAPHIC FOCUS ON THE GENITALS."

Throughout its Brief the State assumes that the materials regulated by O.R.C. 2907.323(A)(3) will be classified as child pornography. As Mr. Osborne has shown in his Brief, however, the materials regulated by O.R.C. 2907.323(A)(3) fall outside the definition of child pornography as set out in *New York* v. *Ferber*, 458 U.S. 747 (1982). (Appellant at 32-42) Even if these materials were child pornography, Mr. Osborne has the right to possess them in the privacy of his home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

A. To Protect Mr. Osborne's Possession In The Case At Bar, This Court Does Not Need To Create A New Constitutional Right.

The State argues in Section I(B) of its Brief that, before it can overturn Mr. Osborne's conviction, this Court must find a new constitutional right "to possess child pornography in the privacy of the home." (Appellee at 16) To the contrary, the fundamental right to view whatever one likes in the privacy of one's home has long been part of this country's heritage. U.S. Const. amend. I; *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

The State claims that possession of child pornography is the equivalent of committing an illegal sexual act in one's home. (Appellee at 16-17) The State misrepresents the character of

the conduct regulated by O.R.C. 2907.323(A)(3). Possession of a photograph is like the possession of a book. Each is nothing more than a communication held in abeyance until the possessor casts an eye upon the page. The ideas conveyed may be good or bad, noble or base, but receipt of them is not a criminal act. The State has no right to control the content of men's minds or of their libraries. *Stanley*, 394 U.S. at 566. Recognizing the right to possess communicative materials creates no new constitutional right.

The State argues that the holding in *Stanley* limits constitutional protection for the private possession of unprotected communicative materials to obscenity. It cites in support of this position a footnote in *Stanley* in which this Court said that it did not "mean to express an opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials." (Appellee at 18) This Court there cited 18 U.S.C. 793(d), which criminalizes the possession of classified national security materials, which might be used to the injury of the United States. *Stanley*, 394 U.S. at 568 n. 11.

The State suggests that this footnote means that the constitutional rights recognized in *Stanley* do not protect the private, in-home possession of child pornography. However, in citing 18 U.S.C. 793(d), this Court was not excluding from constitutional protection non-obscene printed material or film that a person might possess for personal use. Mr. Osborne is not asking this Court to create a new constitutional right, but to recognize his long-established right to privacy and to receive communicative materials.

B. The State Has No Compelling Interest In Prohibiting The Private, In-Home Possession Of Communicative Materials.

In Section I(c) of its Brief, the State claims a compelling interest in prohibiting the private, in-home possession of child pornography. However, it does not demonstrate that interest.

1. A Prohibition On Possession Of The Materials Regulated By O.R.C. 2907.323(A)(3) Is Not Narrowly Tailored To Prevent The Circulation And Distribution Of Child Pornography.

The State claims that prohibiting possession will prevent further circulation and distribution of depictions of child nudity. A statute prohibiting circulation and distribution would be more narrowly tailored to serve this end and would be less invasive of the right to private, in-home possession of communicative materials.

2. Prohibiting Possession Of The Materials Regulated By O.R.C. 2907.323(A)(3) Will Not "Dry Up" The Market For Child Pornography.

The State argues that prohibiting in-home possession for personal use is an appropriate means to serve its interest in combating child pornography, because such a prohibition will "dry up" the chain of distribution. (Appellee at 19-21) But the State does not explain how such a prohibition will achieve that goal. The State claims that a penalty for private possession is now necessary because "much of the child pornography market has been driven underground, and . . . is non commercial." (Appellee at 20) The State claims that it is easier to locate and prosecute private possessors than to locate and prosecute private producers and distributors. (Appellee at 20, citing *Ferber*, 458 U.S. at 759-760) This questionable assertion was rejected in *Stanley* and should be rejected again. *Stanley*, 394 U.S. at 567-568.

The State argues that "[c]hild pornography is . . . often homemade as in Osborne's case." (Appellee at 20-21) This factual assertion goes beyond the record. In *Ferber*, this Court cited the harms specific to commercial production and distribution as significant considerations in its determination that child pornography is unprotected speech. Private production does not carry the same degree of risk of harm. Multiple copies, mass distribution, and glossy, high-tech production are absent in a non-commercial setting. But even if private production

were the main source of child pornography, a prohibition on possession is not the most narrowly tailored means to stop production. A statute prohibiting production would better serve this goal.

In *Ferber*, this Court authorized the criminalization of the commercial production and commercial distribution of child pornography to "prevent the abuse of children who are made to engage in sexual conduct for commercial purposes." *Ferber*, 458 U.S. at 753. Commercial production and commercial distribution are the essence of the child pornography industry. Criminalizing the private, in-home possession of child pornography will not stop production and distribution.

3. The Material Regulated By O.R.C. 2907.323(A)(3) Cannot Be Prohibited On The Theory That It May Be Used To Commit A Subsequent Crime.

The State asserts that child pornography may be used as a "criminal tool" by pedophiles to convince children to engage in sexual activity. (Appellee at 21-23) This assertion goes beyond the record in this case. Even if it is true that some child molesters use child pornography to seduce, it is the conduct of child molesting that should be punished and not the possession of child pornography. Prohibiting the possession of child pornography would penalize many who never consider molesting a child. The State's implication that the possession of child pornography leads to the actual abuse of children is highly speculative. The anecdotal account cited by the State (Appellee at 22-23) does not establish a causal link between possessing child pornography and molesting children. The state may prohibit harmful activity but may not prohibit the possession of every instrumentality that might be used for an illegal purpose, particularly where the instrumentality is communicative material. The State's claim that some child molesters possess child pornography is not a sufficient basis for prohibiting the private, in-home possession of these materials.

III. THE STATE MAY NOT, CONSISTENT WITH FIRST AMENDMENT RIGHTS OF SPEECH, PROHIBIT THE POSSESSION OR VIEWING OF MATERIALS WHICH DEPICT MINORS IN A STATE OF NUDITY WHERE THE NUDITY CONSTITUTES A "LEWD EXHIBITION" OR INVOLVES "A GRAPHIC FOCUS ON THE GENITALS."

A. Depictions Of Child Nudity, Where The Nudity Constitutes A "Lewd Exhibition," Or "Involves A Graphic Focus On The Genitals," Are Protected Speech.

The State argues in Section II of its Brief that the Ohio Supreme Court's construction of O.R.C. 2907.323(A)(3) does not go beyond the *Ferber* definition of child pornography. Throughout its argument, the State pretends that the phrase "lewd exhibition" as used by the Ohio Supreme Court has the same meaning as "lewd exhibition of the genitals" as used in *Ferber*. This is not true. The Franklin County Court of Appeals adopted the phrase "lewd exhibition of the genitals" (J.A. 29), but the Ohio Supreme Court dropped the requirement that genitalia be depicted when it determined that only a lewd exhibition is required. This Court said in *New York* v. *Ferber*, 458 U.S. 747 (1982), that "lewd exhibitions of the genitals" fell within the definition of child pornography assuming that the New York courts did not "widen the possibly invalid reach of the statute by giving an expansive construction" to that phrase. *Ferber*, 458 U.S. at 773. Child pornography as defined in *Ferber* requires a depiction of sexual conduct. *Ferber*, 458 U.S. at 765. A "lewd exhibition" could include simple nudity. It clearly does not include sexual conduct, since depictions of sexual conduct are regulated by other statutes. O.R.C. 2907.321; O.R.C. 2907.322. As construed by the Ohio Supreme Court, O.R.C. 2907.323(A)(3) prohibits the possession of constitutionally protected materials.

The State claims that O.R.C. 2907.323(A)(3) is not overbroad but fails to address the many aspects of overbreadth cited by

Mr. Osborne. In particular, the State does not address the following.

1. The Inclusion Of "Viewing" Is Overbroad.

The State fails to respond to Mr. Osborne's assertion that the prohibition against viewing renders O.R.C. 2907.323(A)(3) substantially overbroad. This prohibition means that even one who does not possess the prohibited material could be convicted if it comes within his line of vision, as where a person passes by a drive-in movie theater. The inclusion of "viewing" means that O.R.C. 2907.323(A)(3) reaches considerable conduct that is beyond what the state may prohibit consistent with the First Amendment.

2. The Inclusion Of "Possession" Is Overbroad.

For the reasons stated above, the inclusion of a prohibition on possession serves no compelling interest of Ohio and is therefore an overbroad regulation. U.S. Const. amend. I; *Stanley* v. *Georgia*, 394 U.S. 557 (1969).

3. The Inclusion Of Non-Commercial Production And Distribution Is Overbroad.

The State argues that it is constitutionally permissible to criminalize possession of depictions of nude minors, absent any commercial production or commercial distribution. (Appellee at 33-34) It argues that, under *Ferber*, a state may criminalize mere possession: "While it is true that *Ferber* was directed at commercial distribution of child pornography, the court's opinion in *Ferber* clearly indicates that a commercial purpose is not required, . . ." (Appellee at 34) The State does not explain how it derives from *Ferber* its conclusion that a commercial purpose is not required. The sole issue before this Court in *Ferber* was whether "to prevent the abuse of children who are made to engage in sexual conduct for commercial purposes" New York might "prohibit the dissemination of material which shows children engaged in sexual conduct." *Ferber*, 458 U.S. at 753. In *Ferber* this Court found the harm to the child to lie in commercial production and commercial distribution. It was the child pornography industry that this Court found to be harmful to children. This Court did not have before it a situation involving photographs of children taken, as in the case at bar, in a non-commercial context, or involving the possession of photographs of children by a person not engaged in their production or sale.

4. The Failure To Require A "Posing" Is Overbroad.

One aspect of the overbreadth of O.R.C. 2907.323(A)(3) is that it does not require that a photograph be posed. (Appellant at 40) The State suggests, however, that O.R.C. 2907.323(A)(3) as construed by the Ohio Supreme Court requires that a child be "posed" in a photograph. (Appellee at 30) By stating that O.R.C. 2907.323(A)(3) requires a "posing," the State implies that some kind of manipulation of the photographic model is essential for conviction. In fact, neither O.R.C. 2907.323(A)(3) nor the Ohio Supreme Court's construction of it so requires. Ohio Revised Code 2907.323(A)(3) covers even a candid photograph of a child running naked on a beach or playing in a bathtub if the focus or camera angle is "graphic." This is a far cry from the staging of a sexual performance that was at issue in *Ferber*.

B. The Ohio Supreme Court's Construction Of Ohio Revised Code 2907.323(A)(3) Is Not Narrowly Tailored To Serve A Compelling State Interest.

The State argues that even if no sexual conduct occurs in a photograph depicting a nude child, such conduct may have taken place before or after the photograph was taken. (Appellee at 35 n.16) The State then claims that O.R.C. 2907.323(A)(3) is narrowly tailored to serve Ohio's interest in preventing child sexual abuse. A narrowly tailored statute would punish the child sex abuser and not the possessor of a photograph which does not depict any sexual conduct.

The State misreads the exception for parents in O.R.C. 2907.323(A)(3). (Appellee at 35) Ohio Revised Code

2907.323(A)(3) as written permitted parents to possess photographs of their nude children. But if, as the State asserts, the Ohio Supreme Court has turned O.R.C. 2907.323(A)(3) into a child pornography statute, then the exception permits parents to possess, or authorize others to possess, child pornography involving depictions of their own children. The fact that this result is so outrageous demonstrates that the Ohio Supreme Court turned O.R.C. 2907.323(A)(3) into something other than what the legislature intended.

Incredibly, however, the State asserts that the parental exception confirms "that protected or innocent conduct is outside the scope of the statute." (Appellee at 35) It says that the exception indicates that "Ohio has chosen to make clear that it has not proscribed possession for bona fide and proper purposes." (Appellee at 35) If O.R.C. 2907.323(A)(3) prohibits possession of child pornography in order to protect the children involved in its production, as the State asserts, this purpose is defeated by letting parents possess or authorize production or possession of pornographic depictions of their children.

The State similarly misreads the O.R.C. 2907.323(A)(3) exception for possession for an artistic purpose. (Appellee at 35) Here too, in O.R.C. 2907.323(A)(3) as written, an artistic purpose exception made sense. Its effect was to allow possession of artistic depictions of child nudity. But if O.R.C. 2907.323(A)(3) as construed by the Ohio Supreme Court regulates child pornography, then the artistic purpose exception makes no sense.

The State says that the exceptions in O.R.C. 2907.323(A)(3) limit O.R.C. 2907.323(A)(3) to regulating child pornography only. (Appellee at 35) But they do not. The State inadvertently concedes that O.R.C. 2907.323(A)(3) as construed regulates depictions of mere nudity when it says that the purpose of the parental exception is to exclude the liability of a parent for possessing a photograph "of his or her naked one year old running on a beach or romping in a wading pool." (Appellee at 35) This is what the Ohio legislature intended. As the State

acknowledges, if this exception were not in O.R.C. 2907.323(A)(3), a parent would be liable for possessing a photograph of his naked child, precisely because O.R.C. 2907.323(A)(3) prohibits depictions of mere nudity.

The fact that O.R.C. 2907.323(A)(3), even as construed by the Ohio Supreme Court, prohibits possession of depictions of mere nudity demonstrates that it remains overbroad and is not narrowly tailored to serve Ohio's interest in combating child pornography.

CONCLUSION

In its Brief, the State of Ohio says nothing that effectively rebuts the three propositions of law asserted by Appellant Clyde Osborne. Mr. Osborne stands convicted of an offense that did not exist when he was charged. He has the right under the Constitution to possess the materials in question. Mr. Osborne asks this Court to grant the relief he requested in his Brief.

Respectfully submitted,

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